

TAB D

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Application by BellSouth Corporation,)
for Authorization To Provide In-Region,)
InterLATA Services) **WC Docket No. 02-307**
in the States of Florida and Tennessee)
)

DECLARATION OF JEFFREY A. KING
ON BEHALF OF AT&T CORP.

I. BACKGROUND

1. My name is Jeffrey A. King. My business address is 1200 Peachtree Street, N.E., Atlanta, Georgia 30309. I am employed by AT&T as a District Manager in the Local Services & Access Management organization. I received a Bachelor of Arts degree in Business Administration with a concentration in Industrial Administration from the University of Kentucky in 1983. I joined AT&T's Access Information Management organization in April 1986 and worked developing and testing the ordering and inventory Access Capacity Management System for electronically interfacing High Capacity access orders with incumbent local exchange carriers (ILECs). In December 1992, I joined the Access Management organization and managed customer/supplier relations on interstate access price issues, including access charge impacts and tariff terms and conditions analysis, with BellSouth Telecommunications, Inc. ("BellSouth") and Sprint LTD. In addition, my responsibilities included ILEC cost study analysis. I began supporting AT&T's efforts to enter the local services market with the implementation of the Telecommunications Act of 1996. Since July 1998, my

responsibilities have included analyzing ILEC costs and recommending all cost-based prices charged by ILECs. I testified on behalf of AT&T and WorldCom on non-recurring cost issues in the Florida UNE ratemaking proceeding, Docket No. 990649-TP. My responsibilities also include managing access charges paid by AT&T to ILECs in the nine state BellSouth territory. I have been working directly on issues relating to BellSouth's Switched Access (SWA) Contract Tariff.

II. PURPOSE OF DECLARATION

2. My declaration addresses three issues associated with BellSouth pricing and tariff issues. First, I describe AT&T's small and medium sized business facilities-based local entry plan in Florida and the negative impact of BellSouth's "hot cut" non-recurring charge ("NRC") of over \$160 on that plan. This extremely high charge undercuts AT&T's ability to compete in the small and medium sized business market by making it cost prohibitive to convert business customers from UNE-Platform ("UNE-P") to a facilities-based UNE-Loop ("UNE-L") service.

3. Second, I discuss BellSouth's recently announced charge of \$200 per day per line to expedite an order and how that hinders AT&T's ability to serve customers. With this charge, it can cost AT&T several thousand dollars to obtain service for a customer quickly. Exercising its monopoly muscle, BellSouth has unilaterally -- and without cost study support -- imposed this claimed "market" charge. It is clearly discriminatory.

4. Finally, my testimony discusses the failure of BellSouth and its long-distance affiliate BellSouth Long Distance, Inc. ("BSLD") to comply with the nondiscrimination requirements of Section 272. Section 272 is an integral component of the Section 271 authorization process in that it prohibits a BOC from engaging in anticompetitive conduct in

favor of its long-distance affiliate and discriminating against its competitors. BellSouth has submitted to the Commission and to each state commission in its service territory its BellSouth SWA Contract Tariff that offers “growth” discounts designed to permit smaller carriers such as BSLD to pay lower rates per minute of use than larger, established carriers such as AT&T. Such “growth” discounts have been explicitly prohibited by the Commission, as they violate Section 272(c)(1) and 272(e)(3) and blatantly discriminate in favor of smaller carriers such as BSLD and against IXCs that are experiencing declining access minutes due to BellSouth entry into long distance and a growing CLEC presence that diverts access minutes from BellSouth.

III. BELLSOUTH’S HOT CUT CHARGES STIFLE AT&T’S ABILITY TO OFFER FACILITIES-BASED SERVICE TO BUSINESS CUSTOMERS IN FLORIDA.

5. One of AT&T’s strategies for Florida local telephone entry for small and medium-sized businesses involves UNE-P and UNE-L services and is divided into two stages. In the first stage, AT&T plans to acquire local telephone customers in Florida using a UNE-P based approach, thereby enabling a transparent service transition of the customer service and avoiding the large up-front costs associated with purchasing and collocating the equipment necessary to provide facilities-based services. In the second stage, after AT&T has acquired a sufficient number of customers to make deployment of its own switching and other equipment economically feasible, AT&T plans to migrate in bulk its UNE-P customers to a facilities-based UNE-L service.

6. AT&T has already begun to implement its Florida local telephone entry plan. AT&T currently serves a number of small and medium sized business customers in Florida using UNE-P and UNE-L, and AT&T has developed plans to convert those customer’s lines from UNE-P based lines to UNE-L facilities-based lines in the future.

7. A critical component of migrating customers from UNE-P based services to UNE-L based services is the physical transfer of the UNE-P loops served by AT&T from BellSouth switches – where those loops currently terminate – to AT&T’s switches. The process of physically transferring a line that terminates on BellSouth’s equipment to AT&T’s equipment without a significant service outage is called a “hot cut.”

8. BellSouth charges AT&T and other CLECs a fixed up-front fee – that is supposed to be consistent with TELRIC principles – for performing hot cuts. BellSouth’s charge for hot cut functions include the following components:

Electronic Service Order Charge	\$ 1.52
Installation (2W VG SL 2 loop)	\$135.75
Order Coordination for Specified Conversion	<u>\$ 23.02</u>
Total	\$160.29 ¹

9. This approximate \$160 rate does not comply with TELRIC. In the Florida UNE rate proceeding, I served as AT&T’s non-recurring cost witness and reviewed BellSouth’s NRC rates. I submitted testimony showing that BellSouth’s NRC study on which the hot cut rate was based significantly overstated BellSouth’s costs.²

10. I raised a number of concerns about BellSouth’s NRC study in my testimony and addressed various other issues in my restatement of BellSouth’s NRC rates (submitted to the Florida Commission as Exhibit-JAK-3). First, the study included costs that were not justifiable in a forward looking environment, including, for example, unnecessary work groups and costs as part of the CLEC provisioning process that BellSouth’s own retail operations

¹ This is the rate that applies to the first loop of each hot cut order. The cost for each additional loop on the same order is \$ 82.47.

² Rebuttal Testimony of Jeffrey A. King, Florida Docket No. 990649-TP (revised Sept. 12, 2000) ; Supplemental Rebuttal Testimony of Jeffrey King, Docket N. 990649-TP (filed Aug. 28, 2000).

did not incur. I adjusted the work times estimated by BellSouth to reduce inflated work time estimates provided by BellSouth and to make work times consistent across different BellSouth UNE studies for similar work routines. BellSouth's use of varying work times for the same work routines had increased CLEC costs with no justification or logic. I also made changes to correct BellSouth's failure to use forward-looking assumptions about use of automated, cost-saving technology. BellSouth had assumed 100% manual work at a variety of its work centers and did not take account of use of intelligent digital and optical support equipment that permits remote electronic access and mechanized efficiencies in connection with UNEs and UNE combinations.

11. Correcting these BellSouth errors reduced BellSouth NRC costs, including the hot cut costs, substantially. I submitted a revised version of BellSouth's NRC cost study that adjusted inputs, altered work times, and deleted duplicative and inappropriate costs. My TELRIC-compliant hot cut rate elements totaled \$22.63 for the first hot cut and \$12.34 for each additional hot cut in the same order.

12. Evidence of other carriers' hot cut rates supports my view that BellSouth's hot cut rate is vastly overstated. For example, the Florida Commission has recently authorized a hot cut rate of \$75.48 for Verizon in Florida, which is approximately half the BellSouth rate. Moreover, BellSouth's Florida hot cut rate is demonstrably higher than the rate charged by other BOCs in other jurisdictions.

Table 1. Comparison of Hot Cut Rates in States

STATE	First Hot in Order	Additional Hot Cuts in Same Order
Florida (BellSouth)	\$160.29	\$82.47
Florida (Verizon)	\$75.48	\$17.74
New York	\$35.00	\$35.00
Pennsylvania	\$4.34	\$3.28
Texas	\$25.74 (standard time; no overtime)	\$25.74 (standard time; no overtime)

California (PacBell)	\$29.93	\$3.24
----------------------	---------	--------

13. BellSouth's overstated Florida hot cut NRC creates a significant barrier to AT&T's small and medium sized business telephone entry plans. As a result of the overstated hot cut charge, AT&T's cost of migrating the first loop for any business customer from UNE-P based services to UNE-L based services is approximately \$160. That high level of costs means that AT&T has to either (1) recover \$160/line in revenues to cover BellSouth's massive hot cut charge; or (2) absorb that cost. Neither approach is economically feasible. If AT&T attempted to pass on these exorbitant hot cut rates in the form of higher local telephone rates, it would retain and acquire fewer customers. Nor is it economically feasible for AT&T to absorb the hot cut charge. AT&T's internal analysis shows that, based on BellSouth's \$160/line Florida hot cut charge, the time it would take to recover AT&T's up-front costs and investment extends beyond the expected customer retention period. Therefore, if BellSouth's \$160 charge for a hot cut remains in effect in Florida, AT&T cannot pursue its plan to convert UNE-P customers to facilities-based UNE-L services. That analysis also shows that, given BellSouth's hot cut charge, a stand-alone UNE-L service – *i.e.*, a service that does not rely on AT&T's UNE-P to UNE-L migration strategy – would be economically infeasible. As a result, BellSouth's \$160 hot cut rate thwarts AT&T's efforts to offer facilities-based services in which AT&T can provide small and medium sized businesses new and innovative services to compete with BellSouth for the business market.

III. BELLSOUTH'S CHARGE OF \$200 PER LINE PER DAY TO EXPEDITE AN ORDER IS UNJUSTIFIABLE.

14. BellSouth is unilaterally imposing a \$200 per day per line charge for expedition of any order. This charge is not based on cost studies or other supporting

documentation and reflects BellSouth's apparent belief that it may impose what it calls a "market-based" charge for this service. This plainly violates the pricing requirements of the Act.

15. BellSouth cannot charge an expedition rate unilaterally, and there is no basis for what it claims is a "market" charge on rivals who are dependent on BellSouth for service. Section 252(d) requires that rates and charges be nondiscriminatory and based on cost, and BellSouth's expedition charge satisfies neither of those requirements. In addition, BellSouth refuses to provide supporting cost evidence to justify the charge. Such unwillingness is not surprising, as there is no evidence that would support such a charge for expedition of an order.

16. At present, AT&T has little commercial choice when faced with a customer request that requires expedition. BellSouth is willing to expedite an order, but only if AT&T pays the \$200 per day per line ransom. Earlier this month, AT&T needed to expedite an unbundled loop order for 6 loops, and was notified by BellSouth representatives that AT&T would be charged \$6000 by BellSouth for expediting the order from October 8 to October 3. This is nothing more than commercial harassment and is indicative of BellSouth's mind-set with regard to its customer/competitors: BellSouth imposes costs, requires escalation, and causes delay, all with the goal of increasing the cost of doing business for CLEC competitors. BellSouth cannot be found to be in compliance with its obligations under checklist item 2 of Section 271 as long as it charges this totally outrageous rate.

IV. BELLSOUTH'S SWA CONTRACT TARIFF FILINGS

17. On May 17, 2002, BellSouth filed its BellSouth SWA Contract Tariff with the Commission.³ Under the terms of the tariff, for the 8 MSAs⁴ in which BellSouth has pricing

³ BellSouth Telecommunications, Inc. Transmittal No. 637, Tariff F.C.C. No. 1, Section 26, BellSouth SWA Contract Tariff, Original Page 26-1 et seq. (eff. May 18, 2002) ("BellSouth

flexibility pursuant to Part 69, Subpart H, of the Commission's rules, BellSouth stated it was making available volume discounts to parties that would execute a multi-year contract. In its explanation accompanying the filing, BellSouth describes its SWA Contract Tariff as a "volume and term plan" discount, but the increasing volume requirements make clear that the SWA Contract Tariff is a "growth" tariff. Volume discounts are available over a five year contract period for annual growth in switching usage compared to a specified minimum level. This specified minimum level is the carrier's projected local switching minutes for the first year of the contract based on the trend of the most recent 18 months' local switching usage prior to the beginning of the contract.⁵

18. To be eligible to subscribe to the Tariff, BellSouth required that a carrier had to have been a BellSouth SWA customer for the prior 18 months (Section 26.1.2(B)). In addition, the customer was required to execute a Letter of Agreement that included the term of the agreement, the MSAs to which the agreement applied, and the minimum usage discount table (Section 26.1.2(A)). A customer that was similarly situated could subscribe to the Tariff for a period of thirty days after the effective date of the Tariff (Section 26.1.1(D)).

19. Carriers have limited opportunity to cancel the agreement in response to other offerings by BellSouth. The contract can be cancelled only once by a party in order to subscribe to another contract tariff offering by BellSouth (Section 26.1.2(I)), and this right is available only on the anniversary date of the contract.

FCC Tariff').

⁴ Those eight MSAs are Montgomery, AL; Jacksonville, Miami/Ft. Lauderdale/Hollywood, Orlando, and Panama City, FL; Atlanta and Columbus, GA; and LaFayette, LA.

⁵ See Letter from C. D. Hatchcock, Regulatory & External Affairs Vice President, BellSouth Telecommunications, Inc. to N. Carpenter, Director, Communications Division, Public

20. A carrier must achieve growth each year over the minimum level to receive a discount, and the discount applies only to those revenues that exceed the amount associated with the stated minimum. In the first year, a 7% discount is available for usage in excess of the stated minimum, a 10% discount is given for growth of 2-10% over the stated minimum level, and a 15% discount is available if growth exceeds 10% of the stated minimum. In years two and three, carriers must achieve at least 2% growth over the stated minimum to receive a discount. For year two, the discount is 15% for growth of 2-10% and 20% if growth exceeds 10% of the stated minimum, and those discount percentages increase to 20% and 25% for year three. In years four and five, 10% growth over the stated minimum is required to receive a discount, and the discounts increase to a maximum of 35% for more than 10% growth over the stated minimum in the fifth year of the contract (Section 26.1.5(B)).

21. BellSouth has also filed its BellSouth SWA Contract Tariff in each of its service territory states.⁶ The state tariff filings include state-specific minimum volume levels, and BellSouth is making volume discounts on intrastate access available to parties that increase

Staff, N.C. Utilities Comm. (the "Hatchcock Letter"), Executive Summary at 2 (May 23, 2002).

⁶ BellSouth Telecommunications, Inc. – Alabama, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff AL2002-01, eff. June 17, 2002; BellSouth Telecommunications, Inc. – Florida, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff FL2002-01, eff. June 17, 2002; BellSouth Telecommunications, Inc. – Georgia, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff GA2002-01, filed June 6, 2002; BellSouth Telecommunications, Inc. – Kentucky, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff KY2002-01, eff. June 28, 2002; BellSouth Telecommunications, Inc. – Louisiana, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff LA2002-01, eff. June 20, 2002; BellSouth Telecommunications, Inc. – Mississippi, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff MS2002-01, eff. June 14, 2002; BellSouth Telecommunications, Inc. – North Carolina, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff NC2002-01, issued May 23, 2002 (cancelled per NCUC order); BellSouth Telecommunications, Inc. – South Carolina, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff SC2002-01, eff. June 26, 2002; and BellSouth Telecommunications, Inc. – Tennessee, Access Services Tariff, E26.1 BellSouth SWA Contract Tariff TN2002-01, issued June 28, 2002 .

annual minutes of use over the life of the contract. In the North Carolina filing, BellSouth candidly stated that the SWA Contract Tariff is designed to provide “discounts based upon positive incremental local switching usage.”⁷ As in the case of the federal tariff filing, these state proposals discriminate against established IXCs such as AT&T and favor smaller IXCs such as BellSouth’s affiliate BSLD that has lower traffic volumes at present but is projected to grow as BellSouth receives Section 271 authorization to provide in-region interLATA service.

22. In North Carolina, AT&T filed a complaint against BellSouth claiming that the BellSouth SWA Contract Tariff in North Carolina was discriminatory and anticompetitive.⁸ Upon receipt of the complaint, the North Carolina Utilities Commission (“NCUC”) suspended the tariff, ordered an investigation, and directed the parties to file papers with the NCUC.⁹

⁷ Hatchcock Letter, Executive Summary at 2.

⁸ Complaint for Anticompetitive Activity Pursuant to N.C.G.S. 62-73; 62-133.5(a)(iii) and (iv); 62-133.5(d) and (e); and 62-134; and Commission Rule R1-9 and Motion to find Tariff Noncompliant or Suspend Tariff for Failure to Comply with N.C.G.S. 133.5(a)(iii) and (iv); 62-133.5(a) and (e) and Commission Tariff Rule R9-4, *In the Matter of BellSouth Telecommunications, Inc. Intrastate Access Services Tariff/New Section 26/BellSouth SWA Contract Tariffs*, Docket No. P-100, Sub 30, Docket No. P-55, Sub 1365 (N.C. Util. Comm.) (filed June 20, 2002).

⁹ Order Suspending Tariff and Seeking Further Comments, *In the Matter of Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements*, Docket No. P-55, Sub 1365 (N.C. Util. Comm.) (filed June 25, 2002). The parties submitted the following papers on the issue. BellSouth’s Comments, *In the Matter of Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements*, Docket No. P-55, Sub 1365 N.C. Util. Comm. (filed July 16, 2002); AT&T’s Reply Comments, *In the Matter of Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements*, Docket No. P-55, Sub 1365 N.C. Util. Comm. (filed Aug. 1, 2002).

23. On August 13, 2002, the NCUC issued its Order Disapproving Proposed Tariff.¹⁰ Specifically, the NCUC rejected BellSouth's North Carolina SWA Contract Tariff as being "biased" and "not being in the public interest." *NCUC Disapproval Order* at 4, 5. The NCUC did not accept BellSouth's claim that the growth tariff would help BellSouth retain traffic on its network and stated that BellSouth should offer a discount based on volumes:

if the aim is to stimulate the volume of purchases (and, hence, revenue), it would better serve the public interest if the discounts offered were volume-based, instead of being based upon percentage increases over a baseline. After all, even a relatively modest percentage increase in the volume of purchases from a high-volume IXC could dwarf the increased volume coming from a low-volume IXC or a group of them. This would mean that much more revenue for BellSouth.

Id. at 5 (emphasis in original). The NCUC "encourage[d] BellSouth to experiment with volume-based discounts for access service that are not biased against high-volume IXCs." *Id.*

24. In Florida, on July 16, 2002, AT&T petitioned the Florida Public Service Commission to cancel BellSouth's Florida growth tariff filing,¹¹ and BellSouth included with its response on August 12, 2002 a revision to its proposal that includes its BellSouth SWA Pricing Flexibility Service that makes available the growth tariff on a contract basis to interested parties.¹² The revised tariff established a three-tier system of discounts based on the carrier's

¹⁰ Order Disapproving Proposed Tariff, *In the Matter of Complaint for Anticompetitive Activity and Motion to Find Tariff Noncompliant or Suspend Tariff and Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements*, Docket No. P-55, Sub 1365 & 1366, N.C. Util. Comm. (filed Aug. 13, 2002) (the "NCUC Disapproval Order").

¹¹ Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. FL2002-02 Filed by BellSouth Telecommunications, Inc. *In re Petition of AT&T Communications of the Southern States, LLC for Suspension and Cancellation of Switched Access Contract Tariff No. FL2002-02 Filed by BellSouth Telecommunications, Inc.*, Docket No. 020738-TP (Fla. Pub. Serv. Commn) (filed July 16, 2002).

¹² Answer of BellSouth Telecommunications, Inc. to Petition of AT&T Communications of

minimum usage amount, with discounts being available upon reaching 500 million MOUs annually, but this revision otherwise did not change the unlawful aspects of its growth tariff proposal. On September 13, 2002 AT&T filed an amended petition to cancel BellSouth's growth tariff,¹³ and BellSouth submitted its response on October 3, 2002.¹⁴ The Commission staff has established a schedule for consideration of the matter.

25. In Tennessee, AT&T joined a coalition with other CLECs that have opposed BellSouth's Tennessee growth tariff filing and sought rejection of that state tariff.¹⁵ On August 12, 2002, BellSouth withdrew its tariff. On September 13, 2002, BellSouth filed with the Tennessee Regulatory Authority a revised tariff that included the same revised BellSouth SWA Pricing Flexibility Service proposal that was filed in Florida.¹⁶

the Southern States, LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. FL202-02 Filed by BellSouth Telecommunications, Inc., *In re Petition of AT&T Communications of the Southern States, LLC for Suspension and Cancellation of Switched Access Contract Tariff No. FL2002-02 Filed by BellSouth Telecommunications, Inc.*, Docket No. 020738-TP (Fla. Pub. Serv. Commn) (filed Aug. 12, 2002).

¹³ Amended Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of General Intrastate Access Contract Tariff Filed by BellSouth Telecommunications, Inc. *In re Petition of AT&T Communications of the Southern States, LLC for Suspension and Cancellation of Switched Access Contract Tariff No. FL2002-02 Filed by BellSouth Telecommunications, Inc.*, Docket No. 020738-TP (Fla. Pub. Serv. Comm.) (filed Sept. 13, 2002)

¹⁴ BellSouth Telecommunications, Inc.'s Answer to, and Partial Motion to Strike, Amended Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of General Intrastate Access Tariff Filed By BellSouth Telecommunications, Inc., *In re Petition of AT&T Communications of the Southern States, LLC for Suspension and Cancellation of Switched Access Contract Tariff No. FL2002-02 Filed by BellSouth Telecommunications, Inc.*, Docket No. 020738-TP (Fla. Pub. Serv. Commn) (filed Oct. 3, 2002).

¹⁵ CLEC Coalition Petition to Suspend Tariff and To Convene a Contested Case Proceeding, *In re Petition to Suspend BellSouth Tariff No. TN2002-01 and to Convene a Contested Case Proceeding*, Docket No. 02-00740 (Tenn. Regulatory Auth.) (filed July 22, 2002).

¹⁶ Letter from Charles Howorth, Jr., BellSouth, to Joe Werner, Chief, Telecommunications Div., Tennessee Reg. Auth. (Sept. 13, 2002), attaching BellSouth Telecommunications, Inc. –

26. In Georgia, AT&T has filed its opposition to BellSouth's Georgia SWA Contract Tariff, and BellSouth withdrew its Georgia growth tariff on September 5, 2002.¹⁷

V. BELLSOUTH'S SWA CONTRACT TARIFF DISCRIMINATES AGAINST LARGE IXCS WITH DECLINING VOLUMES IN FAVOR OF SMALL AND GROWING CARRIERS SUCH AS BELLSOUTH'S LONG DISTANCE AFFILIATE BSLD

27. BellSouth's Tariff discriminates against large, established IXCs such as AT&T, and in favor of smaller, growing IXCs such as BSLD in violation of Section 272 of the Act. BellSouth's Tariff discriminates by offering discounts based on percentage growth from a fixed customer base. This discount structure has a discriminatory impact on established interexchange carriers with large customer bases, which are difficult to grow annually and are, in fact, likely to shrink as BellSouth obtains Section 271 authority to enter the long distance market in its service territory states. Moreover, gradually expanding local competition in the BellSouth service territory will mean that, for some increasingly substantial number of calls, a CLEC -- not BellSouth -- will be the originating and/or terminating carrier, and access charges will be owed to various CLECs rather than to BellSouth.

28. Section 272(c)(1) "establishes an *unqualified prohibition* against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities." *Non-Accounting Safeguards Order* ¶ 197 (emphasis added).¹⁸ Moreover, Section 272(e)(3)

Tennessee, Access Services Tariff, E26 BellSouth SWA Pricing Flexibility, issued Sept. 13, 2002.

¹⁷ AT&T Communication of the Southern States L.L.C.'s Application for Leave to Intervene and Notice of Opposition, *In the Matter of BellSouth Telecommunications, Inc.'s Revisions to its Access Services Tariff To Introduce BellSouth SWA Contracts*, Docket No. 15533-U (Ga. Pub. Serv. Commn) (filed July 1, 2002).

¹⁸ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as amended*, First Report and Order, CC Docket No. 96-149,

expressly “require[s] the BOCs to charge nondiscriminatory prices” for telephone exchange service and exchange access. *Id.* ¶ 258. The Commission has explicitly ruled, in the context of its review of interstate switched access service tariffs, that a BOC may not adopt tariff rates employing so-called “growth discounts”¹⁹ because such discounts will inevitably favor a BOC’s section 272 affiliate over established IXCs, thereby violating the BOC’s section 272 nondiscrimination obligations. *Access Charge Reform NPRM*, ¶ 192.²⁰

29. The discrimination under the Tariff is conclusively demonstrated by the fact that IXC customers that deliver equal traffic volumes to BellSouth could pay dramatically different rates for the same service. An IXC with increasing switched access MOU volumes can take advantage of the growth discount plan and enjoy discounts up to 35% while an IXC with no growth or a declining trend cannot obtain these discounts. As a result, the effective per-minute switched access rate for customers with growth will be lower than the rate for customers with the same amount of traffic that are not growing.

30. The Tariff is also discriminatory and not cost-based because the discounts are predicated solely on growth, rather than on absolute volumes that give rise to economies of scale and cost savings. Relative volume growth is not a justifiable basis for providing a rate discount because a low base makes significant growth percentages possible even if the absolute

11 FCC Rcd 21905, 21998 (1996) (“*Non-Accounting Safeguards Order*”).

¹⁹ “Growth discounts,” as defined by the Commission, are “pricing plans under which incumbent LECs offer reduced per-unit access service prices for customers that commit to purchase a certain percentage above their past usage, or reduced prices based on growth in traffic placed over an incumbent LEC’s network.” *Access Charge Reform*, Notice of Proposed Rulemaking, CC Docket No. 96-262, 11 FCC Rcd 21354, 21437-38 (1996) (“*Access Charge Reform NPRM*”).

²⁰ See also *Access Charge Reform*, Fifth Report and Order, CC Docket No. 96-262, 14 FCC Rcd 14221, 14294 (1999) (citations omitted, emphasis added) (“*Access Charge Reform Fifth*

volume growth is insignificant and provides no economies to BellSouth. A small carrier that is growing can obtain a volume discount and pay lower access charges than AT&T notwithstanding AT&T's significantly higher total access MOU volumes. Under the skewed discounts provided with BellSouth's Tariff, small, growing carriers will enjoy lower per minute switched access rates than would be available to AT&T with significantly larger access MOU volumes on BellSouth's network.

31. Moreover, the BellSouth Tariff is designed to benefit BellSouth's long distance affiliate BSLD. The BellSouth SWA Contract Tariff was filed at the Commission two days after BellSouth obtained Section 271 authorization to provide in-region, interLATA service in Georgia and Louisiana. BSLD begins with a very small customer base, and once it enters the interLATA market, it is likely to leverage BellSouth's monopoly customer base into a large share of the long distance market at the expense of the large IXCs. With growth in access minutes, BSLD will be eligible for the significant discounts under the Tariff that will lower its per-minute access cost.

32. In connection with BellSouth's application for Section 271 authorization for the states of Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, BellSouth has claimed that its BSLD affiliate cannot take advantage of the SWA Contract Tariff. This is incorrect. BellSouth's first explanation, advanced on August 5, 2002, was that BSLD had not been a BellSouth switched access customer for 18 months as required by the Tariff: "*Obviously, BSLD does not have '18 months' local switching usage prior to the beginning of the contract*"²¹ Seven days later, however, BellSouth conceded that "BSLD has in fact been

Report and Order").

²¹ Joint Reply Affidavit of John A. Ruscilli and Cynthia A. Cox, *In the Matter of the*

almost exclusively a terminating switched access customer for 18 months.”²² Then, 24 hours later, the story changed again. BellSouth admitted that BSLD is a “BellSouth switched access customer with respect to both interstate and intrastate traffic” and “the nature of the BSLD switched access minutes is predominantly terminating traffic that originated outside the BellSouth region and terminating traffic that originated from wireless providers.”²³ Clearly, BSLD’s status as a switched access customer for the past 18 months would qualify BSLD to take advantage of the Tariff, and BellSouth’s refusal candidly to admit as much is telling.

33. BellSouth has also argued that BSLD cannot take service under the SWA Contract Tariff because BSLD failed to sign up during the 30-day ordering window and BSLD does not have the minimum number of minutes to qualify. Aug. 12 Letter at 2. BellSouth’s assertion that BSLD failed to meet the minimum number of minutes under the Tariff is plainly wrong. The Tariff is based on the individual customer’s usage during the 18 prior months, and that usage becomes the base-line against which future growth (and the size of the discounts) is measured. As the Executive Summary of the North Carolina SWA Contract Tariff filing makes clear, “[t]he minimum local switching usage is defined as the projected year 1 local switching

Application of BellSouth Corporation, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC Docket No. 02-150 (filed Aug. 5, 2002), at ¶ 76 (emphasis added).

²² Letter from Sean A. Lev, BellSouth counsel, to Marlene H. Dortch, Secretary, FCC, *In the Matter of the Application of BellSouth Corporation, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, WC Docket No. 02-150 (August 12, 2002) (emphasis in original) (“Aug. 12 Letter”).

²³ Letter from Sean A. Lev, BellSouth counsel, to Marlene H. Dortch, Secretary, FCC, *In the Matter of the Application of BellSouth Corporation, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, WC Docket No. 02-150 (August 13,

usage based upon the trending of the most recent available 18 months local switching usage prior to the beginning of the term. Each customer's minimum local switching usage will determine which of three discount bands the customer is eligible for."²⁴ The Tariff also makes clear in Section 26.1.2.A that each carrier signing up for the Tariff must agree with BellSouth on the "Minimum Usage Discount Table." Thus, under the Tariff, the "Minimum Usage Discount" is a negotiated number for each participating carrier based on that carrier's usage for the prior 18 months, and each contracting party will have a separate minimum usage amount. BellSouth's contention that the Tariff contains an absolute minimum usage amount that all potential carriers must satisfy (and therefore stands as an impediment to BSLD taking service under the Tariff) is nothing more than after-the-fact spin.

34. BellSouth also attempts to claim that there is no Section 272 issue because BSLD cannot take service under the SWA Contract Tariff. This is not correct. Even assuming, *arguendo*, that BSLD cannot take service under BellSouth's SWA Contract Tariff, the Commission's pricing flexibility rules allow an ILEC to provide service under a contract tariff to its long distance affiliate only after the ILEC certifies that it provides service under the contract tariff to an unaffiliated carrier. 47 C.F.R. § 69.727(a)(2)(iii). This provision specifically references both Section 272 for the definition of the "long-distance affiliate" and 47 C.F.R. § 64.1903 relating to obligations of ILECs with respect to their long-distance affiliates under Section 272. Accordingly, any effort by BellSouth to use SWA Contract Tariff to meet its certification requirements under 47 C.F.R. § 69.727(a)(2)(iii) clearly raises Section 272 concerns.

2002) ("Aug. 13 Letter").

²⁴ Hatchcock Letter, Executive Summary at 2. This Executive Summary attached to the North Carolina filing was not included with the federal filing, but the same principle for determination of the minimum usage levels would apply to the federal tariff.

As BellSouth has now made clear that BSLD has been a switched access customer for 18 months, there is no impediment to BellSouth entering into the same arrangement with BSLD once BellSouth certifies that it provides service under the SWA Contract Tariff to an unaffiliated party. Moreover, BellSouth's use of the linear regression projection methodology to compute the minimum usage amounts means that BSLD will satisfy any minimum usage requirements in the near future.

35. It would clearly be inconsistent with Section 272 for BellSouth to enter into such a growth arrangement under the SWA Contract Tariff with BSLD. Given BellSouth's dissembling with respect to BSLD's eligibility to take service under the SWA Contract Tariff, BellSouth cannot demonstrate that it complies with Section 272 unless it agrees not to use the SWA Contract Tariff as the basis for a future Contract Tariff with BSLD or to certify under 47 C.F.R. § 69.727(a)(2)(iii) that it is providing service under SWA Contract Tariff and is thus eligible to enter into a similar arrangement with BSLD.²⁵

VI. CONCLUSION

36. BellSouth's \$160 hot cut rate and \$200 per day per line/circuit to expedite an order are vastly overstated and cause competitive injury to AT&T in its efforts to serve its customers. BellSouth cannot be found to satisfy checklist item two until these charges are replaced by TELRIC-compliant rates. In addition, BellSouth's proposed SWA Contract Tariff violates its nondiscrimination obligations under Section 272 of the Communications Act through

²⁵ The tariff is also discriminatory in restricting the rights of IXCs to cancel the Contract in response to other offerings by BellSouth. Under the Tariff, an IXC can cancel the contract only once to subscribe to another contract tariff. (Section 26.1.2(I)). This cancellation right is limited to the anniversary date of the contract. As a result, BellSouth may be able to make improved offers to its BSLD affiliate that cannot be adopted by IXCs that have already changed their contract once. A similar provision appears in each state tariff.

its discrimination against large interexchange carriers such as AT&T and favoring smaller, growing carriers such as BellSouth's long distance affiliate. This Commission should require the cancellation of the SWA Contract Tariff or its replacement by a tariff based on absolute volumes that tie the efficiencies that give rise to cost savings to the volumes that make such cost savings possible.

I, Jeffrey King, declare under penalty of perjury that the foregoing is true and correct.



Jeffrey King

Executed on October 10, 2002.